

STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. PL03WE-63668

X.Y.Z. parent/guardian o/b/o A.B.,)
a minor, and X.Y.Z. individually,)
)
Complainant,)
)
v.)
)
Hamilton Township Board of Education,)
)
Respondent.)

Administrative Action

FINDING OF NO PROBABLE CAUSE

On February 27, 2013, X.Y.Z.¹ (Complainant), who is African-American, filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that the Hamilton Township Board of Education (Respondent) failed to take prompt, effective, remedial action to end the racial bullying of her daughter, A.B., in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. Complainant also alleged that when she complained about the bullying, Respondent retaliated by transferring her daughter to a school that was farther away from their home. Respondent denied the allegations of discrimination and retaliation in their entirety. The DCR Director reviewed the agency's ensuing investigation and now finds as follows.

On or about Thursday, November 29, 2012, A.B., a third grader at George Wilson Elementary School, came home from school and told Complainant that during recess, she and two other African-American girls were on the playground talking when a fourth girl, C.D., who is Caucasian, "tried to get in our conversation" and they told her to go away. A.B. told Complainant that C.D. became angry and called her a "black monkey on the monkey bars," and a "faggot."

¹ Pseudonyms are used to protect the privacy of the minors involved.

The next day, Friday, November 30, 2012, Complainant went to the school and spoke with her daughter's teacher, Kelly Wagner, and School Counselor/Anti-Bullying Coordinator Karen Mihalow. Principal Barbara Panfili was also notified. That day, Mihalow met with A.B., C.D., and the other children involved, and contacted C.D.'s mother. Respondent confined C.D. to the office during recesses and lunch. Mihalow filed a Harassment, Intimidation and Bullying (HIB) report on A.B.'s behalf.

The following week, December 3 through 7, 2012, A.B. gave her teacher three notes that she found in her desk and on the floor near her desk. One note had the phrase, "black monkey," written on it. Another said, "youra bitch." At least two of the notes were signed with C.D.'s first name. Wagner gave the notes to Mihalow, who met with several of the students in the class that sat near A.B. Each student said that she or he did not see anyone put the notes in A.B.'s area. Wagner stated that she could not be certain that C.D. wrote the notes. Although the notes were signed with C.D.'s name, her name was misspelled.

On Friday, December 7, 2012, Principal Panfili called the four children involved in the playground incident to her office. She asked each girl to write a statement about the notes and offensive remarks. She wanted to see if any of the girls' handwriting matched the handwriting on the notes. The only handwriting that came close to resembling the writing on the note was C.D.'s. C.D. denied writing the notes. That same day, Mihalow called Complainant to let her know that the HIB investigation was nearing completion.

On Monday, December 10, 2012, Complainant kept A.B. home from school. A.B. never returned to the George Wilson Elementary School.

On Tuesday, December 11, 2012, Mihalow called Complainant to arrange a meeting. Complainant stated she would get back to Mihalow.

On Wednesday, December 12, 2012, Mihalow submitted the HIB report, which Superintendent Dr. James Parla reviewed the next day. The report stated that the school found

evidence that C.D. bullied A.B. by calling her names and making demeaning comments to her. The report stated that Respondent was unaware of any incidents between A.B. and C.D. before November 29, 2012. Dr. Parla sent a letter to C.D.'s parents advising them of the results of the HIB investigation and of the disciplinary action the district took against their child, which included lunch and recess detention. The remedial measures included having C.D.'s mother sign a release form for the school counselor to speak with C.D.'s therapist.² In addition, Mihalow spoke with all of the students involved and began conflict resolution by encouraging the children to discuss the incidents and how they felt about them.

That day, Complainant went to the school with a family friend and met with Mihalow and Panfili. Panfili mentioned a number of strategies to keep the girls separated during the day such as changing their classes and closely monitoring them during lunch and recess. However, Complainant stated that she wanted A.B. transferred out of the school altogether and sent to Greenwood Avenue Elementary School (Greenwood). They told her that such a request should be made in writing and sent to the school district's Interim Director of Administration, Gary Mattia.

On December 14, 2012, Complainant formalized her request in a letter to Mattia, asking that A.B. be "transferred out of GE Wilson Elementary School ASAP." The letter did not specify that she wanted A.B. to attend Greenwood.

On December 17, 2012, Mattia replied via letter advising Complainant that A.B. had been transferred to the Kisthardt Elementary School (Kisthardt). Complainant alleged that Respondent did not transfer A.B. to the school of her choice, i.e., Greenwood, but rather to Kisthardt, which was farther from Complainant's home. Complainant claimed that this was an act of retaliation designed to punish her for complaining about bullying.

² C.D. was a classified student on an individualized education plan (IEP).

DCR found that Kisthardt is actually closer to Complainant's home than Greenwood. When the DCR investigator relayed that information to Complainant, she replied that Kisthardt was farther from the train station and it was difficult to get A.B. to her after school programs. Respondent told DCR that there were no openings in Greenwood at the time, and that Kisthardt was in the group of elementary schools that sends their students to the Wilson Middle School.

At the conclusion of an investigation, the DCR Director is required to determine whether "probable cause exists to credit a complainant's allegations of the verified complaint." N.J.A.C. 13:4-10.2. For purposes of that determination, "probable cause" is defined as a "reasonable ground for suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person to believe that the [LAD] was violated." Ibid. If the Director determines that there is probable cause, then the complaint will proceed to a hearing on the merits. N.J.A.C. 13:4-11.1(b). However, if the Director finds there is no probable cause, then that finding is deemed a final agency order subject to review by the Appellate Division. N.J.A.C. 13:4-10.2(e); R. 2:2-3(a)(2).

Analysis

Under New Jersey law, "[w]hen a student is subjected to severe or pervasive bullying on the school bus, in the classroom, or at the playground, and a school district fails to adequately respond to that misconduct, that student has a right to redress." L.W., et al. v. Toms River Reg'l Schs. Bd. of Educ., 189 N.J. 381, 412 (2007). The Court wrote, "[A] district is not compelled to purge its schools of all peer harassment to avoid liability. Rather, we require school districts to implement preventive and remedial measures to curb severe or pervasive discriminatory treatment." 189 N.J. at 407. The Court likened school bullying cases to hostile work environment cases but noted that students are not always held to the same standard as co-workers:

Schools are unlike the adult workplace . . . [C]hildren may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on,

students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender specific conduct that is upsetting to the students subjected to it.

Id. at 408 (quoting Davis v. Monroe County Bd. of Educ., 525 U.S. 629, 651-52 (1999)). In determining whether conduct is sufficiently severe or pervasive to trigger the LAD, courts “look to all circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance . . .” Shepherd v. Hunterdon Devel. Ctr., 174 N.J. 1, 19-20 (2001). The Supreme Court wrote:

We do not suggest, however, that isolated schoolyard insults or classroom taunts are actionable. Rather, in the educational context, to state a claim under the LAD, an aggrieved student must allege discriminatory conduct that would not have occurred “but for” the student’s protected characteristic, that a reasonable student of the same age, maturity level, and protected characteristic would consider sufficiently severe or pervasive enough to create an intimidating, hostile, or offensive school environment, and that the school district failed to reasonably address such conduct.

L.W., supra, 189 N.J. at 402-03. Even in the adult workplace, derogatory name-calling based on race does not automatically violate the LAD. See, e.g., Heitzman v. Monmouth County, 321 N.J. Super. 133, 148 (App. Div. 1999) (concluding that anti-Semitic comments did not constitute severe or pervasive conduct because they were casual, sporadic, and did not involve any physical threat).

If a plaintiff can meet its burden of demonstrating a severe or pervasive hostile educational environment, the plaintiff must then demonstrate by the preponderance of the evidence that the school district failed to adequately respond by implementing effective preventive and remedial measures. The evaluation of the school’s response must be made in light of the totality of the circumstances. L.W., supra, 189 N.J. at 408 & 409 (“Illustratively, a reasonable response to name calling among grade schoolers may be inadequate to address violence among teenagers.”) Relevant factors include, but are not limited to, the students’ ages, developmental and maturity levels, school culture and atmosphere, rareness or frequency of the

conduct, duration of the harassment, extent and severity of the conduct, whether violence was involved, history of harassment within the school district and between the students, swiftness of the school's response and the effectiveness of the school's response. Id. at 409.

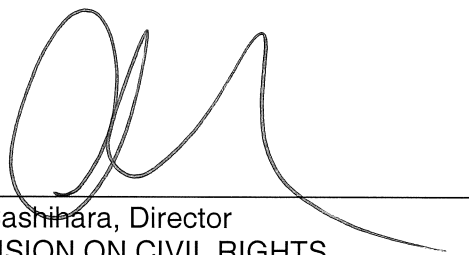
Here, there is some question as to whether C.D.'s conduct, while wholly inappropriate and unacceptable, can be properly characterized as "severe or pervasive" in view of the factors set forth by the Supreme Court in L.W., supra. The handful of name-calling incidents occurring over a six-day period appears to have been limited and sporadic. There was no evidence or allegation that A.B. was subjected to any bullying before the November 29, 2012, playground remark. There is no allegation, for instance, of physical treats or a persistent or prolonged pattern of conduct. As the Court stated in L.W., a "school cannot be expected to shelter students from all instances of peer harassment." Id. at 406.

But even assuming for the moment that the playground remark and three notes could be deemed "severe or pervasive," the evidence did not support Complainant's allegation that the school district failed to adequately respond in light of the totality of the circumstances. L.W., supra, 189 N.J. at 408 & 409. The day that school officials learned about the playground incident, they took action. Anti-Bullying Counselor Mihalow met with the children involved. C.D. was disciplined and her parents were notified. After A.B. told her teacher that she found the notes, Respondent investigated the matter. Moreover, it took different approaches during its investigation to try and determine who wrote the notes, but was unable to reach a conclusive result. Based on investigation, Respondent did determine that C.D. bullied Complainant. Respondent notified C.D.'s parents of the result of the HIB investigation and imposed consequences and remedial measures to prevent any further acts of bullying. It sought permission from C.D.'s parents to send C.D. for counseling. Respondent granted Complainant's request to transfer A.B. out of the school within days of the request. Ultimately, the effectiveness of Respondent's remedial actions at George Wilson Elementary could not be

determined because Complainant removed A.B. from the school. However, after considering the children's ages, maturity levels, rareness of the conduct, and other factors listed by the Supreme Court in L.W., supra, the Director is satisfied that the school's responses were sufficiently prompt and reasonably calculated to address the conduct. Thus, the investigation did not corroborate Complainant's allegation of a hostile school environment.

Nor did the investigation corroborate Complainant's allegation of retaliation. The LAD makes it illegal to "take reprisals against any person because that person opposed any practices or acts forbidden under this act, or . . . filed a complaint, testified, or assisted in any proceeding under this act," or "aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by this act." N.J.S.A. 10:5-12(d). Here, Complainant asked that A.B. be transferred. Respondent complied. Complainant's theory of retaliation is based on her incorrect assertion that Kisthardt is farther away from her house than Greenwood. Although Respondent did not transfer A.B. to the school of Complainant's choice, it provided a legitimate non-retaliatory reason for the placement. Respondent explained that there were no openings at the Greenwood School, and that Kisthardt was part of the group of schools that send students to Wilson Middle School, where A.B., would ultimately attend. The investigation found no evidence to suggest that Respondent's explanation was merely a pretext designed to mask a retaliatory animus.

WHEREFORE, it on this 13th day of May 2014, hereby determined and found that no probable cause exists to credit Complainant's allegations of discrimination.



Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS